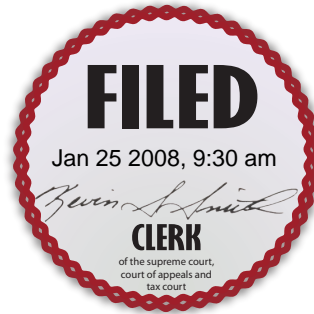


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER COLLINS,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 49A04-0702-PC-121

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No.49G06-9409-PC-115822

January 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Christopher Collins appeals the denial of his petition for post-conviction relief. On appeal, Collins raises one issue, which we restate as whether the post-conviction court properly denied Collins relief on his claims of improper sentencing. We affirm, concluding the post-conviction court properly denied Collins relief.

Facts and Procedural History

Around September 1994, the State charged Collins with burglary as a Class B felony. The case was referred to Marion County Superior Court 6 and filed under cause number 49G06-9409-CF-115822 (“Cause 822”). On January 25, 1995, Collins pleaded guilty. In exchange for Collins’s guilty plea, the State recommended that the trial court order Collins’s sentence to run concurrent with sentences yet to be imposed for four other convictions. On February 24, 1995, the trial court sentenced Collins to ten years, with six years executed, four suspended, and two years of probation upon release from incarceration. The trial court also ordered that Collins’s sentence run concurrent with the sentences for his other four convictions¹ and that Collins receive 160 days of pre-sentencing credit time.

On October 25, 1999, Collins was released from incarceration. On March 14, 2000, the State charged Collins with burglary as a Class B felony related to an incident in Shelby County and sought a sentence enhancement based on Collins’s alleged status as an habitual offender. On March 28, 2000, based on this burglary charge, the probation department filed

¹ Collins received sentences of ten years or less for three of these convictions. For the remaining conviction, burglary as a Class B felony, which was referred to Marion County Superior Court 1 and filed

a notice with the trial court alleging that Collins had violated a condition of his probation.² On December 28, 2000, Collins was convicted of burglary and also found to be an habitual offender. Based on this conviction and finding, the Shelby County Superior Court sentenced Collins to fifty years. On January 25, 2001, the trial court conducted a hearing and found that Collins had violated a condition of his probation.³ The trial court ordered that Collins serve the suspended portion of his sentence on Cause 822 (four years) and that the sentence run consecutive to his sentence for the December 2000 burglary conviction, resulting in an aggregate sentence of fifty-four years.

On May 16, 2005, Collins filed a pro se petition for post-conviction relief. On October 6, 2006, the post-conviction court conducted a hearing. On December 18, 2006, the post-conviction court issued findings of fact and conclusions of law denying relief. Collins now appeals.

under cause number 49G01-9409-CF-121897 (“Cause 897”), Collins was sentenced to fifteen years, with ten years executed, five suspended, and three years of probation upon release from incarceration.

² The probation department had filed a notice of probation violation on December 16, 1999, based on a December 8, 1999, incident that resulted in the State charging Collins with battery and disorderly conduct. The record does not indicate whether Collins was convicted of these charges and, if so, whether the convictions served as a basis for finding Collins had violated a condition of his probation.

³ Although the record is not entirely clear, it appears that Collins was ordered to serve his probationary terms consecutively, starting with the two-year term under Cause 822, and followed by the three-year term under Cause 897. See Appellant’s Appendix at 107 (letter from probation department to trial court stating, “we will run the probationary period ordered [under Cause 822] consecutive to [the probationary period ordered under Cause 897] unless otherwise instructed”); id. (trial court’s handwritten notation directing probation department that “[t]he probations are to run in the order of the most restrictive to least restrictive”); see also Marion LR49-CR00-112 (“Where terms of probation are mandated to run consecutively under Indiana Code § 35-40-1-2(d), the term calling for the least restrictive conditions shall run consecutive to the term(s) calling for more restrictive conditions. The Marion Superior Probation Department

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, when the petitioner appeals from a denial of relief, the denial is considered a negative judgment and therefore the petitioner must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003).

II. Propriety of Sentence

Collins argues his original sentence of ten years, with six years executed and four suspended, exceeds the maximum sentence for burglary as a Class B felony. The post-conviction court found that Collins was sentenced to ten years for burglary as a Class B felony and that at the time Collins was sentenced, the maximum sentence for a Class B felony was twenty years. Based on these findings, the post-conviction court concluded Collins was not entitled to relief.

At the time of Collins's sentence in February 1995, the presumptive term for a person who committed a Class B felony was ten years, with not more than ten years added for

shall make the determination as to which term of probation is more restrictive, and as to which term shall be

aggravating circumstances and not more than four years subtracted for mitigating circumstances. See Ind. Code § 35-50-2-5 (1993). Collins received a ten-year sentence for burglary as a Class B felony. See Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant’s total sentence includes both the executed and suspended portion of a sentence), trans. denied. Thus, the post-conviction court properly concluded Collins was not entitled to relief based on his claim that his sentence exceeded the statutory maximum.

Collins also argues the post-conviction court improperly denied him relief on his claim that the trial court should not have ordered him to serve the suspended portion of his sentence under Cause 822. To support his argument, Collins claims that because he was entitled to one day of credit for each day served, see Ind. Code § 35-50-6-3(a), upon his release in October 1999, he had already served the entire ten-year term of his sentence under Cause 822 and therefore could not be ordered to serve the suspended portion. We note initially that the post-conviction court did not address this argument in its findings of fact and conclusions of law. Nevertheless, because Collins preserved this argument, see Appellant’s Appendix at 19 (Collins’s petition stating as grounds for relief that he “completed the 10 year sentence” upon his release in October 1999); see also id. at 137 (Collins’s proposed findings of fact and conclusions of law stating that his “entire 10 year sentence was completed upon his release from the Department of Correction on October 25, 1999”), and because the record allows for meaningful appellate review, we will address the argument on its merits, cf.

served first.”).

Harrison v. State, 707 N.E.2d 767, 784 n.20 (Ind. 1999) (concluding that although the post-conviction did not address an issue raised in the petition for relief, “remand is not necessary because the facts supporting [the petitioner’s] claim are in the . . . record and a legal argument is presented in his brief”), cert. denied, 519 U.S. 933 (1996).

Our review of the record indicates Collins was ordered to serve the suspended portion of his sentence under Cause 822. See Appellant’s App. at 9 (chronological case summary for Cause 822 stating that “Court now revokes probation and ORDERS Defendant committed on sentence heretofore imposed”). It is reasonable to infer that Collins received Class I credit under Indiana Code section 35-50-6-3(a) because he was incarcerated for slightly less than five years despite having received an executed sentence of ten years under Cause 897. However, Collins’s argument that he had already served his entire sentence under Cause 822 upon his release in October 1999 overlooks that the credit time he earned applied to the executed portion of his sentence, not the suspended portion. See Ind. Code § 35-50-6-1(a) (“[W]hen a person imprisoned for a felony completes the person’s fixed term of imprisonment, less the credit time the person earned with respect to that term, the person shall be . . . released to the committing court if the sentence included a period of probation.”).

Thus, because Collins was serving his two-year probationary term under Cause 822 when he committed the March 2000 burglary, it was proper for the trial court to order Collins to serve the entire portion of his suspended sentence under that cause. See Ind. Code § 35-38-2-3(g) (“If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may . .

. order execution of all . . . of the sentence that was suspended at the time of initial sentencing.”).

Conclusion

The post-conviction court properly denied Collins relief on his claims of improper sentencing.

Affirmed.

KIRSCH, J., and BARNES, J., concur.